(2)

No. 87-2037

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DAVID LAWRENCE KAHN,

Petitioner,

vs.

AVNET, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT AVNET, INC. IN OPPOSITION

GEORGE L. GRAFF
Attorney for Respondent
Avnet, Inc.
The Chrysler Building
405 Lexington Avenue
New York, New York 10174
(212) 867-6660

Of Counsel:
DAVID R. TORAYA
LAWRENCE I. WEINSTEIN

QUESTIONS PRESENTED

1. Is there a significant dispute among the Circuits that the "conspiracy" requirement of 42 U.S.C. § 1985(2) is not met when plaintiff alleges that actions were undertaken solely by a single individual acting on behalf of a corporation and its subsidiary?

2. Is it appropriate for this Court to grant certiorari to consider the applicability of the "intracorporate conspiracy" doctrine to the witness intimidation provisions of 42 U.S.C. § 1985(2) in a case where:

(a) the plaintiff was not a party to the litigation in which the alleged intimidation occurred;

(b) the only act of "force, intimidation or threat" alleged was the lawful termination of an at will employment;

(c) the alleged "conspiracy" only involved a single named individual;

(d) the alleged intimidation was not intended to, and did not in fact, deter any person's testimony or attendance in court; or

(e) the plaintiff in this action did not allege the plaintiff in the underlying action suffered any injury as a result of the alleged "conspiracy"?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1985

. . .

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror . . .

(3) . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

No. 87-2037

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DAVID LAWRENCE KAHN,

Petitioner,

VS.

AVNET, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT AVNET, INC. IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This action involves a number of claims by plaintiff David Kahn ("Kahn") against defendant Avnet, Inc. ("Avnet"), all arising out of Avnet's discharge of Kahn from his employment as a staff attorney in July of 1978. In his First Amended Complaint, Kahn alleged twelve separate claims for relief, including, in addition to the alleged violation of 42 U.S.C. § 1985 which is the subject of this petition, claims for "civil contempt", violation of section 137(b) of the California penal code, abusive discharge, intentional interference with advantageous economic relationship, intentional infliction of "severe distress", violations of sections 215.10(b) and 215.40(2) of the New York penal code, a claim of a private cause of action under 18 U.S.C. § 1503, breach of his employment agreement, breach of an implied covenant of good faith and fair dealing and fraudulent misrepresentation.

Kahn's Section 1985(2) claim, the dismissal of which is the sole issue sought to be reviewed in this petition, was predicated upon an incident which allegedly occurred when Kahn, in pursuing his duties as a corporate attorney for Avnet, was supervising Avnet's document production in a contract dispute then pending in the United States District Court in Georgia between a Georgia hospital and an Avnet subsidiary named Diversified Numeric Applications, Inc. (the "Georgia Action"). Kahn claimed that he had discovered a document — not authored by him — which purportedly was adverse to Avnet's position in the Georgia Action and that Avnet's President relayed an order to Kahn to "lose" the document. Kahn claimed that he refused to do so, and that Avnet's President then called him into his office and fired him.

The document was, in fact, voluntarily produced by Avnet shortly after Kahn's termination (2d Cir. Appendix, at A-494), and Kahn did not claim that the Georgia Action was affected in any way by Kahn's discharge. Nonetheless, Kahn claimed that "the actions of Avnet, Diversified Numeric Applications, Inc., the President of Avnet and additional parties (who will become known during discovery)" constituted a violation of 42 U.S.C.

§ 1985(2), entitling Kahn to recover the damages resulting from the loss of his employment (Kahn App., at D-3 – D-4)[1].

The United States District Court for the Central District of California (Kenyon, J.) granted defendant's motion to dismiss the Section 1985(2) claim, along with all but three of the other counts of Kahn's twelve count complaint, on the ground that Kahn had failed to allege a conspiracy "between two or more persons", as required by the statute (Kahn App., at C-2). And, despite extensive discovery, Kahn never sought to amend his complaint to allege the involvement of any additional individuals in the conspiracy.

After a transfer of venue, the case went to trial in the United States District Court for the Southern District of New York on Kahn's claims of breach of express and implied contract and fraud arising out of his termination. Although Avnet's president, who hired and fired Kahn, had died prior to the commencement of the action and, hence, Kahn's testimony was unrebutted, the jury disbelieved Kahn's claim that he had been orally promised that he would only be fired for "good cause" and found for Avnet on all counts.

On his appeal to the Second Circuit following the adverse jury verdict, Kahn challenged several earlier rulings in the case, including the dismissal of his Section 1985(2) claim. He argued, as he does in this Court, that the "intracorporate conspiracy" exception adopted by this Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), has no applicability to the civil rights laws and that, accordingly, the court could find that a conspiracy existed between Avnet, its subsidiary, and its president.

The Court of Appeals rejected this argument, holding (Kahn App., at A-2) that, under its previous decision in *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir.), *cert. denied*, 439 U.S. 1003 (1978), "the named conspirators – a corporation, its subsidiary,

---

[1] Throughout this brief, the appendix to Kahn's petition for certiorari will be cited as "Kahn App."

and its president — are treated as one person under the 'intracorporate conspiracy doctrine' ". It is this holding which forms the sole basis for Kahn's petition for certiorari.

REASONS FOR NOT GRANTING CERTIORARI

Point I

No Conflict Exists Among The Circuits That Kahn Has Failed To Allege A Conspiracy

Kahn urges that this Court should grant certiorari in order to resolve a purported "conflict in the circuits which is ripe for resolution by this Court" concerning the applicability of the "intracorporate conspiracy" doctrine to claims arising under the Civil Rights Act (Kahn's Petition, at 7-8).[2] However, this case is an inappropriate vehicle for this Court to confront that issue; the only named individual who allegedly participated in the decision to terminate Kahn was Avnet's president, and it is clear that his *unilateral* conduct, whether or not the "intracorporate conspiracy" doctrine applies, is not an act of "two or more persons" within the meaning of 42 U.S.C. § 1985(2).

It is fundamental to a Section 1985(2) claim that the plaintiff must allege an agreement between "two or more persons" to have a conspiracy. The essence of Kahn's position, however, is that a conspiracy claim can be premised on the actions of only one identified individual allegedly acting on behalf of two corporations and joined by unnamed "additional parties."[3] There

---

[2] The "intracorporate conspiracy" doctrine is generally used to describe the rule, adopted by this Court for antitrust cases in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), that coordinated conduct among the officers of a corporation and its wholly owned subsidiaries must be viewed as the acts of a single enterprise and cannot form the basis for a claim of conspiracy.

[3] Paragraph 16 of Kahn's First Amended Complaint (Kahn App., at D-3 – D-4 states in pertinent part as follows:

(Footnote continued)

is simply no case known to Avnet, and certainly none cited by Kahn, which holds that such an allegation would be sufficient to state a claim of conspiracy.

It is true that a dispute has arisen among the circuits as to whether concerted action by two or more individuals who are acting for a single enterprise can constitute a conspiracy for purposes of the Civil Rights Act. *Compare, e.g., Herrmann v. Moore*, 576 F.2d 453 (2d Cir.), *cert. denied*, 439 U.S. 1003 (1978), *with Stathos v. Bowden*, 708 F.2d 15, 20-21 (1st Cir. 1984). However, this inter-circuit dispute centers around whether the joint acts of several named individuals, who would otherwise be clearly guilty of a conspiracy, can be *immunized* from liability simply because they are acting on behalf of a single corporate enterprise.[4]

Avnet is aware of no decision in any federal court which supports the proposition that the actions of only one identified individual are sufficient to allege a conspiracy under Section 1985(2).[5] Without exception, the plaintiffs in every single case, including those cases which have rejected the "intracorporate conspiracy" doctrine in civil rights claims, have identified with particularity two or more individuals who allegedly conspired against plaintiff.[6]

> "16. The actions of Avnet, Diversified Numeric Applications, Inc., the President of Avnet and additional parties (who will become known during discovery) . . . gives David Kahn the right to recover damages pursuant to 42 U.S.C. 1985(2)."

[4] As the First Circuit stated in *Stathos v. Bowden*, 728 F.2d 15, 20 (1st Cir. 1984), "under ordinary conspiracy principles, a jury could plainly impose liability – and there would be no issue – were a *single corporation not involved*." (Emphasis in original).

[5] Kahn's reliance on *Dussouy v. Gulf Coast Investment Corporation*, 660 F.2d 594 (5th Cir. 1981), is misplaced. That decision involved application of the intracorporate conspiracy doctrine under *Louisiana state*, not federal, law dealing with conspiracy in restraint of trade, La. Rev. Stat. Ann. § 51:121 *et seq.*

[6] *See, e.g., Buschi v. Kirven*, 775 F.2d 1240 (4th Cir. 1985) (conspiracy among twenty-five state employees); *Stathos v. Bowden*, 728 F.2d 15 (1st Cir. 1984)

(Footnote continued)

In *Novotny v. Great American Federal Savings & Loan Association*, 584 F.2d 1235 (3d Cir. 1978) (en banc), *rev'd on other grounds*, 442 U.S. 366 (1979), a case upon which Kahn heavily relies, the Third Circuit specifically noted the distinction between the question before it — the applicability of the intracorporate conspiracy doctrine to civil rights claims — and the position which Kahn asserts — that a "conspiracy" can exist between a corporation and an individual who acts on its behalf:

> "As we read Novotny's complaint, however, it does not allege that the corporate entity, GAF, conspired with its officers and directors to his detriment. In defining his cause of action under § 1985(3), Novotny alleges that his termination was accomplished "by the individual defendants in violation of" § 1985(3). *There is thus no occasion to evaluate the force of the proposition that a corporation cannot conspire with itself.* Rather, the sole issue before us, so far as the conspiracy element is concerned, is whether concerted action by officers and employees of a corporation, with the object of violating a federal statute, can be the basis of a § 1985(3) complaint."

(conspiracy among several members of municipal lighting commission); *Doherty v. American Motors Corp.*, 728 F.2d 334 (6th Cir. 1984) (conspiracy among five employees and/or agents of corporation); *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982)(conspiracy between five school district trustees and school superintendent); *Novotny v. Great American Fed. Savings & Loan Ass'n.*, 584 F.2d 1235 (3d Cir. 1978) (en banc), *rev'd on other grounds*, 442 U.S. 366 (1979) (conspiracy among eight officers and directors of corporation); *Herrmann v. Moore*, 576 F.2d 453 (2d Cir.), *cert. denied*, 439 U.S. 1003 (1978) (conspiracy among thirty-eight individuals associated with law school); *Girard v. 94th Street and Fifth Avenue Corp.*, 530 F.2d 66 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976) (conspiracy among officers and entire board of directors of corporation); *Baker v. Stuart Broadcasting Co.*, 505 F.2d 181 (8th Cir. 1974) (conspiracy between two individuals who owned stock of defendant corporation and president of parent corporation); *Dombroski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) (court dismissed claim even assuming "two or more executives of the same firm" involved in conspiracy). *See also United States v. Hartley*, 678 F.2d 961 (11th Cir.), *cert. denied*, 459 U.S. 1170 (1983) (criminal conspiracy under 18 U.S.C. § 371 between vice president and plant manager of corporation).

584 F.2d at 1257-58 (footnote omitted and emphasis supplied). In this case, however, unlike *Novotny* or any of the other cases Kahn cites, the only "persons" identified as participating in the conspiracy are Avnet's president and the two corporations on whose behalf he allegedly acted.[7]

To be sure, Kahn's complaint does contain a general allegation that "additional parties (who will become known during discovery)" participated in the actions. However, such broad, conclusory statements, which do not identify or describe any particular individuals, are not sufficient to state a claim of conspiracy under Section 1985. *Scott v. University of Delaware*, 385 F. Supp. 937, 944 (D. Del. 1974); *see United States v. Verville*, 355 F.2d 527 (7th Cir. 1966) (allegation of conspiracy between defendants and unnamed police and public officials insufficient to state claim in civil rights case).

The fact is that, despite extensive discovery in this case, Kahn has never been able to identify any individual, other than Avnet's president, who participated in the alleged conspiracy. No federal court has held that such unilateral action sufficiently pleads a conspiracy "among two or more persons," either under Section 1985(2) or any other federal conspiracy statute, and there is no dispute among the circuits or other significant federal question raised in this case which justifies consideration by this Court.

---

[7] Another individual, Avnet's Senior Vice President, is identified in the complaint as having relayed the president's instructions to lose the document Kahn allegedly discovered. (*See* Kahn App., at D-2 – D-3). However, there is no allegation that this individual agreed to or participated in the alleged conspiracy to threaten and ultimately fire Kahn for his refusal to lose or surpress that document.

POINT II

Even If A Conspiracy Were Properly Alleged, The Complaint Fails To State A Claim Under Section 1985(2)

Kahn's petition for certiorari is premised upon the unstated assumption that the *only* question as to the sufficiency of his pleading is whether it adequately alleged a conspiracy among "two or more persons". However, although the courts below did not find it necessary to reach the issue, it is clear that wholly apart from Kahn's failure to plead a conspiracy, Kahn's complaint is insufficient under Section 1985(2).

The essential allegations of a Section 1985(2) claim of witness intimidation are (1) a conspiracy between two or more persons, (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in legally cognizable injury to the plaintiff. *David v. United States*, 820 F.2d 1038, 1040 (9th Cir. 1987); *Malley-Duff & Associates, Inc. v. Crain Life Insurance Co.*, 792 F.2d 341, 355 (3d Cir. 1986); *Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496, 498 (9th Cir. 1985); *Chahal v. Paine Webber, Inc.*, 725 F.2d 20, 23 (2d Cir. 1984).

Apart from the fact that only one identified person (Avnet's president) was involved, Kahn's claim fails to meet these requirements in several respects. In the first place, Kahn was simply an attorney for one of the parties to the Georgia Action; he had no personal stake in the outcome. Thus, Kahn was not among the class of persons for whose benefit the statute was enacted and the injury he suffered, the loss of a job which, as the district court and the Second Circuit held, was terminable at will, was not the type of injury which Section 1985(2) was designed to remedy. Moreover, to the extent that the only purpose of the alleged conspiracy was to influence his conduct as an attorney in supervising the production of a document, the complaint fails to allege the requisite purpose of deterring attendance or influencing testimony in federal court.

The clear statutory purpose of the portion of Section 1985(2) relevant to this case is to protect litigants in the federal courts from improper interference with their ability to prosecute or defend their cases. Thus, the only Court of Appeals decision which has ruled on the issue has held that a person who is not a litigant in a federal proceeding, and whose alleged injury is totally unrelated to the effects of the alleged interference on that proceeding, has no standing to assert a claim under Section 1985(2). *David v. United States*, 820 F.2d 1038 (9th Cir. 1987); *see generally Rode v. Dellarciprete*, 1988 U.S. App. Lexis 5642 (3d Cir. April 28, 1988) (court found it unnecessary to decide whether a witness has standing under Section 1985(2) because plaintiff was neither a witness nor a litigant in underlying federal action).

In the *David* case, the plaintiff alleged that she was improperly terminated by her employer as a result of her testimony as a witness in a federal case to which she was not a party. In language wholly applicable to the case at bar, the Ninth Circuit rejected her claim under section 1985(2):

> "David has not alleged how *she* had been injured by her testimony in [the underlying action] or her failure to appear in court. Allegations of witness intimidation under § 1985(2) will not suffice for a cause of action unless it can be shown the *litigant* was hampered in being able to present an effective case. Since David has not shown she was a party to the action in which she was intimidated, she can show no injury under § 1985(2)."

820 F.2d at 1040 (emphasis in original).

In this case, Kahn was not even a witness in the federal action upon which his Section 1985(2) claim is based, he was merely an attorney for one of the litigants. And, as in *David*, the injury he complains of — the loss of his employment — had no bearing whatsoever on the ability of the litigant in the federal claim "to present an effective case."

Moreover, even if Kahn's personal injury were otherwise recoverable under the statute, Kahn sustained no actionable damage as a result of his termination. The jury disbelieved Kahn's testimony that he had been orally promised lifetime employment and, accordingly, under New York law, Kahn was an at will employee whose employment relationship could be terminated at any time, for any reason, or for no reason at all. *See Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983). Because Kahn was an at will employee, he had no measurable right to remain in Avnet's employ and his discharge did not constitute an actual injury under Section 1985(2). *See Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987) (Section 1985(2) claim by bank officer that he was terminated to deter him from testifying at a federal hearing dismissed, *inter alia*, because his discharge from at will employment "did not constitute an actual injury under the statute").

Finally, Kahn's complaint is legally insufficient because the alleged conspiracy (to induce him not to produce a document in discovery) did not have the requisite statutory purpose: "to deter, by force, intimidation, or threat, *any party or witness* in any court of the United States from *attending such court, or from testifying* to any matter pending therein freely, fully and truthfully . . . ." 42 U.S.C. § 1985(2) (emphasis supplied); *see Brown v. Chaffee*, 612 F.2d 497, 502 (10th Cir. 1979); *Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976).

In construing this provision, the courts have consistently limited the applicability of Section 1985(2) to acts of intimidation which directly affect a witness's or party's actual testimony or attendance *in court*. *See, e.g., McLean v. International Harvester Co.*, 817 F.2d 1214, 1218 (5th Cir. 1987) (holding that where plaintiff's "sole basis for seeking . . . relief [under § 1985(2)] rests on the allegations that the defendants . . . failed to disclose information to [plaintiff] and failed to produce documents to [plaintiff] . . ., such allegations, even if proved, are insufficient to state a violation of § 1985(2)"); *Pitts v. Turner & Boisseau, slip op.* (D. Kansas Aug. 26, 1986) (holding that to

violate section 1985(2) the conspiracy "must be one directly affecting the act of testifying in court, or affecting any party from attending court"). *See also Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987) (testimony in a federal administrative proceeding was not "testimony in any court of the United States"); *Kimble v. P.J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir.), *cert. denied*, 454 U.S. 1110 (1981) (alleged conspiracy to deter plaintiffs from filing lawsuits or claims, as opposed to appearing and testifying, did not fall within Section 1985(2)).

The simple fact is that Kahn's sole involvement in the Georgia Action was to function as an attorney supervising document production. There is no hint in the pleading that the purported conspiracy was intended to deter or interfere, in any way, with Kahn's attendance or testimony as a witness at the trial of that action. Even if (despite strong evidence to the contrary) Kahn was discharged by Avnet's president for improper reasons, Kahn hardly states a federal claim for conspiracy to intimidate a witness from attending or testifying in federal court under 42 U.S.C. § 1985(2).

CONCLUSION

For the foregoing reasons, respondent Avnet, Inc. respectfully requests that the petition of David Lawrence Kahn for a writ of certiorari be denied.

Respectfully submitted,

GEORGE L. GRAFF
Attorney for Respondent Avnet, Inc.
The Chrysler Building
405 Lexington Avenue
New York, New York 10174
(212) 867-6660

Of Counsel:
DAVID R. TORAYA
LAWRENCE I. WEINSTEIN